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## LABOR COPARTNERSHIP IN INDUSTRY

THOUGH the courts often dislike it, business men will continue to experiment with new forms of business organization designed to suit their particular needs. At present perhaps the most insistent need of industry, a matter indeed of world-wide concern, is the achieving of an orderly adjustment of the respective functions of capital and labor. American lawyers, especially those whose practice lies in the field of corporate organization, should, therefore, follow with interest experiments which are being undertaken in the solution of this problem.

In the commercial and industrial development of the past century the corporation has proved its immense utility as a device for uniting in common enterprise the capital of many investors, large and small. It is needless to restate here the advantage of doing business under the corporate form. At the same time experience has disclosed certain weaknesses in the corporation, especially the large industrial corporation, organized with the traditional charter provisions. As a business grows older and expands it is likely that an increasing proportion of its capital stock will come to be held by utter strangers, who are unacquainted with its processes and have no appreciation of its problems. The permanent welfare of the company will not receive its surest promotion with the voting power lodged in such an electorate.

Furthermore, the general incorporation laws were passed to enable investors in business enterprise to reap the profits without being subjected to unlimited liability and without, necessarily, participating personally in the conduct of the business. The recognition of the interest and proper position of labor in the enterprise — and by labor is meant for present purposes not merely the manual workers, but the whole clerical, technical, and managerial force as well — was not one of the objects of the legislation. Naturally enough, labor (in this broad sense) would have little incentive to put forth extraordinary efforts merely to increase the corporate dividends. Hence, with industry organized on a corporate basis

innumerable schemes for "bonuses" and "profit sharing"<sup>1</sup> have been devised, somewhat fitfully and sporadically, to supply this incentive.<sup>2</sup>

Some of these profit-sharing experiments have met with fair success, others not; but in general, profit sharing, *without more*, has neither satisfied labor with its position in industry nor demonstrated to capital that the results obtained justified a continuance of the scheme. After an exhaustive review of a variety of profit-sharing plans under trial throughout the United Kingdom, the report of the British Ministry of Labour states in summary:

"On the whole, it must be concluded that, if the employer looks to a scheme of profit-sharing to stimulate his workpeople to increased exertion, *and to maintain the stimulus for a period of years*, he is not unlikely to be disappointed."<sup>3</sup>

Profit sharing is not the ultimate solution of the difficulty because, more fundamentally, the demand of labor is for a definite participation in the management. In the growth of large corporations managerial employees and workmen alike have been reduced too much to the position of mere hirelings, with no personal interest

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<sup>1</sup> See REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, issued by Ministry of Labour; PROFIT SHARING IN THE UNITED STATES: BULLETIN OF THE UNITED STATES BUREAU OF LABOR STATISTICS, 1917, whole No. 208, containing a full bibliography.

<sup>2</sup> The case for profit sharing is put in a most arresting fashion by Mr. A. Hopkinson, M.P., an English employer of labor, speaking in the House of Commons. HANSARD'S PARLIAMENTARY DEBATES (Commons), 21 October, 1920. The following extract may be given here. "I know very well, from experience in the army, both as an officer and in the ranks, that you cannot get men, and particularly any Englishmen or Scotsmen, to obey orders unless they have the firm conviction that the man who gives those orders is in some way better than themselves. I will give just a little example, rather an amusing one, of what I mean. I was serving in the ranks in France, and my corporal came to me once and said, 'You know, when an officer comes from a good family, or knows his work, or is a gallant fellow, or is even good-looking, it's all right, but when he is none of these things it is perhaps a little bit hard upon us.' It was that remark of my corporal that made me think out what is the justification in industry for the position of the employer, and as a result of those thoughts—I may be wrong—I have come to the conclusion that the only thing that can put the employer on that pedestal from which he can give commands with full justification is that he, unlike his men, should not take all that he might."

<sup>3</sup> REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, pp. 27-28

in the business. Profit sharing alone cannot remedy this detachment; more basic measures must be discovered to bring to the industrial corporation and to its employees the benefits of a *de facto* copartnership from the lack of which both are suffering. "As the workmen saw it, good wages, short hours, welfare and considerate treatment were no better than the good treatment of a horse, so long as they were denied a status in the direction of their own labor."<sup>4</sup> The Whitley Reconstruction Committee appointed in October, 1916, by the British Prime Minister "to make and consider suggestions for securing a permanent improvement in the relation between employers and workmen," reported:

"We are convinced, moreover, that a permanent improvement in the relations between employers and employed must be founded upon something other than a cash basis. What is wanted is that the workpeople should have a greater opportunity of participating in the discussion about and adjustment of those parts of industry by which they are most affected."<sup>5</sup>

It is worth while to quote an extract from the report of a "Conference of Operatives and Manufacturers on the Pottery Industry"<sup>6</sup> (England), which considered the industrial situation after the war. Commenting on the topic of "Defects in the Industry from the Point of View of the Operatives" the report states:

"Even where these specific grievances are absent, many of the operatives feel that the conduct of the industry is inconsistent with the democratic principles which are widely and passionately held in the district. They are denied the right of self-government since they have no control of the conditions under which they work; they claim not to be 'hands,' instruments under the control of a superior, but partners in an important social task, with a different but not an inferior social status to their employers."

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<sup>4</sup> FRANK WATTS, AN INTRODUCTION TO THE PSYCHOLOGICAL PROBLEMS IN INDUSTRY. George Allen & Unwin, Ltd., 1921, p. 148. This book may be consulted generally for a consideration of the psychological factors involved.

<sup>5</sup> INTERIM REPORT ON JOINT STANDING INDUSTRIAL COUNCILS, March 8, 1917. The various reports of this committee, and related documents, may be conveniently obtained in a pamphlet entitled THE INDUSTRIAL COUNCIL PLAN IN GREAT BRITAIN, compiled by the Bureau of Industrial Research, 289 4th Avenue, New York City.

<sup>6</sup> Contained in the compilation cited in the previous note.

While this demand for a voice in management has undoubtedly a psychological prompting, as indicated in the foregoing quotations, it is defended, also, on grounds of practical business efficiency. Thus:

"It is not merely a vulgar desire to be masters of the situation rather than somebody else. It is at root based on the conviction that the workers in a trade are likely to arrive at sounder decisions on management than those which at present emerge from the decisions of shareholders' meetings, where the choice of directors may easily result in the election of a group of amateurs." <sup>7</sup>

Why are the non-voting preferred shareholders willing that control should be vested in the common shareholders? The argument is that the common shareholders will be the first to suffer from bad management; therefore their efforts will be redoubled to promote the success of the business, and thus, consequentially, to promote the interests of the preferred shareholders. Now it is urged that this logic should be carried a step further; that more satisfactory results in the large may be anticipated if all those whose coöperation is essential to success are directly identified with the fortunes of the business, and are vested with a responsibility for its good management.<sup>8</sup> But in this country there has been little disposition in industry to experiment along these lines beyond the constitution of advisory committees of workers, and the encouragement of employees to become holders of stock, thus offering them the minority stockholders' theoretical participation in the management. And a recent writer <sup>9</sup> has said of the situation in England, that "there seem to be no important industrial businesses in this country where the workers have any control which is effective against the general body of share-holders; the former are merely a permanent minority, which may satisfy the theory of co-management, but which is immaterial in practice." <sup>10</sup>

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<sup>7</sup> G. R. Stirling Taylor, "A New Basis for Industrial Corporations," 2 JOUR. SOC. COMP. LEG., 3d Series (1920), p. 210.

<sup>8</sup> "The Abdication of the Capitalist," 24 THE NEW REPUBLIC, 112 (Sept. 29, 1920).

<sup>9</sup> G. R. Stirling Taylor, 2 JOUR. SOC. COMP. LEG., 3d Series (1920), p. 213, *supra*, note 7.

<sup>10</sup> I have not referred to the various coöperative societies in all parts of the world, many of which have had local successes. They have had little influence upon the general position of labor in industry. In many of the coöperative societies, especially

In France a notable instance of labor copartnership in industry is found in the fascinating history of the Godin establishment,<sup>11</sup> a "Coöperative Association of Capital and Labor" at Guise, employing over two thousand workers in the manufacture of stoves and cooking utensils. Jean-Baptiste André Godin started his business in 1846. In 1880, he reorganized it on the basis of a limited liability society "*en commandite simple*," and gradually the workers, from their share of the profits, bought out Godin's interest, receiving in exchange share certificates entitling the holders to a fixed return of five per cent per annum. The governing body of the society, called the General Assembly, elects a manager with plenary powers, who holds office during good behavior; that is, he can be dismissed by the Assembly if he involves the society in certain losses, or violates the statutes of the society. This General Assembly is composed of those workers (*associés*) who hold a certain minimum of capital stock, and who for five years have lived in the "*famillistère*," the society's community center, consisting of dwellings, theater, schools, stores, and library. The Assembly also elects a Council of Management, which administers the internal affairs of the *famillistère*, and assists in an advisory capacity the elected manager of the business. The yearly profits, after deductions to cover the fixed five per cent interest on capital, paid in cash, and allowance for maintenance of various mutual insurance funds, and of the schools, are distributed among the workers, in proportion to their earnings, in savings certificates, which become payable in cash when a worker retires. The company, as thus organized, has amply justified the faith of its founder.<sup>12</sup>

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of consumers, the employees stand in about the same position as do the employees of a corporation or joint stock company, so far as participation in profits and control is concerned. See generally, COÖPERATION IN MANY LANDS, L. SMITH-GORDON and C. O'BRIEN, Coöperative Union, Ltd., Manchester (1919); see also REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 6496] 1912, which states (p. 84) that even among the productive associations of workers, for which figures were available, "not quite three out of five of the employees were, in 1910, members of the association for which they worked." Figures for 1918 showed that 68.2 per cent of such employees were members. See REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, pp. 122-137.

<sup>11</sup> For a fuller account, and for further references, see C. R. FAX, CO-PARTNERSHIP IN INDUSTRY, Cambridge Univ. Press (1913), pp. 38 *et seq.*; TWENTY-EIGHT YEARS OF CO-PARTNERSHIP AT GUISE, Translation from the French of Madame Dallet, M. Fabre, and M. and Madame Prudhommeaux, by Aneurin Williams, London, 1908.

<sup>12</sup> Maison Leclaire should also be mentioned as another French success in the field

The influence of Godin is discernible in the French legislation of 1917, authorizing a new form of limited company, called *Société Anonyme à Participation Ouvrière*.<sup>13</sup> Provision is made for capital shares and labor shares. The labor shares are to be held by a separate incorporated association representing all the working staff for the time being. Dividends on these shares are paid to all the members of the association in accordance with its rules. As soon as an employee quits, he ceases also to be a member of the coöperative association holding the labor shares. In the General Assembly, the voting strength of the labor shares and of the capital shares is in the same proportion that each class of shares bears to the whole capital stock; and labor and capital are represented on "Le Conseil d'Administration" in the same ratio.<sup>14</sup>

The Dennison Manufacturing Company at Framingham, Massachusetts,<sup>15</sup> an industrial plant with over three thousand employees, represents a pioneer American effort to meet the problem of enlisting both from managerial and non-managerial employees a proprietary interest in the welfare of the business, and of utilizing to the utmost their accumulated knowledge and business experience. In its essential aspects, the organization calls to mind the work of Godin at Guise. Here, as in the case of the Godin factory, the transformation into an industrial copartnership was a gradual development over a considerable period of years. At its very start, in 1844, Aaron L. Dennison was the sole proprietor and, indeed, literally, "the whole works." In 1855, E. W. Dennison, who had succeeded him, formed a partnership with Albert Metcalf, under the name of "Dennison & Company." At this stage the two partners had the sole ownership and control of the business,

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of industrial copartnership. Its organization differs in detail from the Godin factory, but its basic principles are similar. See C. R. FAY, *COPARTNERSHIP IN INDUSTRY* pp. 58 *et seq.*

<sup>13</sup> *ANNUAIRE DE LEG. FRAN.* (1917), pp. 107-112.

<sup>14</sup> Reference may also be had to other French and Italian legislation along related lines commented upon in G. R. Stirling Taylor, "A New Basis for Industrial Corporations," 2 *JOUR. SOC. COMP. LEG.*, 3d ser. (1920), pp. 215-219, *supra*.

<sup>15</sup> I am indebted to Mr. Elliott D. Smith of the Dennison Mfg. Co. for explanations of the organization, and for copies of the various documents relating thereto. The organization is described in JOHN R. COMMONS, *INDUSTRIAL GOVERNMENT*, The Macmillan Co. (1921), chap. vi.

and the profits were theirs. In 1878 the concern was organized as a normal business corporation with a single class of common stockholders who had all the voting power, and among whom all the profits were divided. To some extent employees were offered inducement to become stockholders, but the character of the organization was in nowise affected thereby. When the company was reorganized in 1911, the business was on a sound basis; money could be borrowed at ordinary rates to finance its development; and hence it was considered fair to limit to the ordinary interest rate the return of those who were connected with the business solely as investors. The common stock formerly held by investors was exchanged at its fair market value (which was many times its par value) for first preferred stock carrying a preferential cumulative dividend of eight per cent, payable quarterly as declared. This transaction was thus a fair business bargain, not an altruistic sacrifice, for the investors exchanged at its market value common stock with an indeterminate dividend for preferred stock with a fixed dividend. All further profits, after the payment of dividends on all the capital stock, were to be invested in the business, and against them were to be issued so-called "managerial industrial partnership stock," to the managerial employees, proportionate to their salaries. "Managerial employees" include directors, and all those who have served with the Company for an aggregate period of five years; "and whose position with the Company . . . requires the exercise of managing ability and control over methods of manufacturing or marketing, such as any executive, department-head, principal foreman, chief-clerk, branch-manager, or principal salesman; or whose work shows the use of a high degree of imagination, tact or business judgment, and who shall have contracted in writing with this company for extra remuneration."<sup>16</sup>

As soon as the outstanding managerial industrial partnership stock, so issued, amounted to one million dollars, it was provided that the whole voting power should vest in this class of stockholders, where it now lies.<sup>17</sup> This managerial industrial partnership

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<sup>16</sup> The application of this provision in determining who are "managerial employees" is left to the directors subject to revision at the annual meeting of the industrial partnership stockholders.

<sup>17</sup> The preferred stockholders are safeguarded, however, by a provision revesting the control in them if their dividend becomes in arrears for a specified period.

stock is entitled to a cash dividend not to exceed twenty per cent (the average has been about ten per cent since the plan went into effect); it is expressly non-assignable, and when one of the holders leaves the employ of the company it must be exchanged for non-voting, transferable, "second preferred stock," of equal face value, entitled, after the payment of the first preferred dividends, to a preferential cumulative dividend of seven per cent per annum, as provided in the by-laws.

Thus far, in the development of the organization, no provision was made for participation in profits and management by the larger group of non-managerial employees. The next step was taken in 1919, when a committee elected by these employees drafted a plan, which was accepted, of a "general works committee,"<sup>18</sup> consisting of about sixty representatives of the employees, elected by departments. This works committee is competent to discuss any factory problem or policy, and its recommendations are referred to various small standing conference committees, composed of an equal number of representatives from the management and from the employees. The recommendations of these conference committees, in turn, are referred back to the works committee and to the management for final approval. Although from a legal standpoint the powers of this works committee are merely advisory, in practice the committee exercises an important and effective influence in factory management. In general it fulfills the function described by the Whitley Reconstruction Committee, as follows:

"Work committees, in our opinion, should have regular meetings at fixed times, and, as a general rule, not less frequently than once a fortnight. They should always keep in the forefront the idea of constructive cooperation in the improvement of the industry to which they belong. Suggestions of all kinds tending to improvement should be frankly welcomed and freely discussed. Practical proposals should be examined from all points of view. There is an undeveloped asset of constructive ability — valuable alike to the industry and to the State — awaiting the means of realization; problems, old and new, will find their solution in a frank partnership of knowledge, experience and goodwill. Works committees would fail in their main purpose if they existed only to smooth over grievances." <sup>19</sup>

<sup>18</sup> For a discussion of similar shop organizations of employees, in various industries, see JOHN R. COMMONS, *INDUSTRIAL GOVERNMENT*, *supra*, chap. xxii.

<sup>19</sup> SUPPLEMENTAL REPORT ON WORKS COMMITTEES, contained in compilation cited

Last year, a further important feature was introduced into the Dennison organization. The works committee drafted a plan, which has been put into operation provisionally for a period of five years, for the issue of stock to the non-managerial employees out of surplus earnings. This so-called "employee industrial partnership stock" is issued to all non-managerial employees of over two years' service, in proportion to their length of service; it is non-voting because, in the language of the committee that drafted the plan, "the Works Committee gives the employees a just share in the management of the problems which affect the employees"; it is entitled to a cash dividend, equivalent in amount to that declared on the managerial industrial partnership stock; it too is non-assignable, and when an employee leaves the company it must be exchanged for non-voting transferable "second preferred stock" drawing a dividend of seven per cent per annum. The foregoing are the main features of the present Dennison organization, though, for the sake of brevity, important details of the carefully drafted instrument have been omitted here.<sup>20</sup>

In essence then the plan is:

1. Return on invested capital: A fixed rate, not to be exceeded, on both classes of preferred stock, held by persons who are simply investors in the business; a variable rate not to exceed twenty per cent on industrial partnership stock held by those whose personal services are devoted to the conduct of the business.
2. Distribution of profits: After payment of the fixed dividend on the first and second preferred stock, one-half of the remaining net

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in note 5, *supra*. The committee recommended the constitution of works committees in each factory, as part of a triple form of organization, representative of employers and employed, consisting of national Joint Industrial Councils, Joint District Councils and Works Committees, "each of the three forms of organization being linked up with the others so as to constitute an organization covering the whole of the trade, capable of considering and advising upon matters affecting the welfare of the industry, and giving to labour a definite and enlarged share in the discussion and settlement of industrial matters with which employers and employed are jointly concerned." See Final Report, July 1, 1918.

<sup>20</sup> For instance, provisions as to dissolution; provisions as to the option in the company to buy up and retire at any time the first and second preferred stock, thus enabling the company to cease expanding its capitalization at any time this may be desirable, by buying in each year the same amount in preferred stock that is issued each year in industrial partnership stock; provisions for holding part of the profits as a temporary surplus, if it is undesirable in any particular year to issue any more industrial partnership stock.

profits may be used in the payment of cash dividends on the industrial partnership stock, as above provided. The balance of the net profits is then distributed in the form of industrial partnership stock, two-thirds to managerial employees, and one-third to the non-managerial employees, as extra remuneration for their services.<sup>21</sup>

3. Control of management: Legal control of the corporation through ownership of the voting stock at all times remains in the hands of the active body of managerial employees (at present 368 in number) who are most conversant with the business, and most responsible for its success. Actual participation in the management is shared also, to a limited degree, by the other employees through their general works committee.

Thus, it may be said that the preferred shareholders are somewhat in the position of deferred creditors of the business, the proportion of the preferred stock to the whole capital stock being a steadily decreasing ratio; that the business is owned and the profits divided by the employees, the managerial employees being in effect senior partners, the rest of the employees being junior partners with an interest in the business and with responsibilities commensurate with their importance. The corporate form carries with it corporate advantages as to limited liability, the holding of property, perpetual existence, suing and being sued, etc. But psychologically and substantially, the Dennison Manufacturing Company is an industrial copartnership with limited liability. There is even the "*delectus personae*," one of the features ordinarily distinguishing a partnership from a corporation; for the industrial partnership stock is non-assignable, and the holders of it cannot by transfer introduce strangers into the active body of associates who control the business and reap its profits. A further advantage of the organization is the assurance of continuity in management and policy, because the voting control is exercised by a conscious entity of the older and more responsible employees, the group personality of which will survive the slow changes in personnel. One of the suggested advantages of doing business under the form of a declaration of trust, with transferable certificates representing the beneficial interest, is that the declaration may provide a self-perpetuating body of trustees, thus securing the permanency of management which is

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<sup>21</sup> Incidentally, the corporation thus escapes paying the higher surtaxes on corporate income.

often impossible in a corporation whose stock is rapidly changing hands.<sup>22</sup> It appears that the Dennison company achieves this end while still retaining the corporate shell.

Might the salient features of this "industrial copartnership" in corporate form be introduced into a business conducted under a different type of organization; for instance, a factory organized as a limited partnership under the common statutory provisions, the invested capital being contributed by A and B, general partners, who are unlimitedly liable and manage the business, and by C, D, E, and F, registered as limited partners? Of course it would be simple enough to introduce a plan of profit sharing by contract between the owners and the employees, but under the usual strict statutory provisions for registry of the names of the partners, and of their capital contributions, it would seem impossible to take the employees gradually into coöwnership of the business. The statutory limited partnership is not adapted to a business with a constantly fluctuating group of proprietors.<sup>23</sup>

It is true that statutes in some states, and the Uniform Limited Partnership Act adopted in several states,<sup>24</sup> provide for the admission of additional limited partners, but the requirements for an amendment of the certificate upon every change of membership, or in the amount of the capital contribution of a limited partner, must be strictly observed, else all the associates will be visited with the liability of general partners. Furthermore, even with this difficulty out of the way, the statutes forbid limited partners to take any part in the management;<sup>25</sup> and associates with the power of control accorded to the managerial employees of the Dennison Manufacturing Company would automatically become general partners. In this connection the use of the limited partnership device which was made by Messrs. Gilbert Brothers, boot manufacturers of Nantwich, England, is worthy of note.<sup>26</sup> The employees constituted a society registered under the Industrial and Provident Societies Act, under the name of "Gilbert Bros.' Employees, Ltd." This

<sup>22</sup> SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., §§ 7 and 8.

<sup>23</sup> See ROWLEY, MODERN LAW OF PARTNERSHIP, §§ 1000 *et seq.*

<sup>24</sup> See TERRY, UNIFORM STATE LAWS, p. 533; BURDICK, PARTNERSHIP, 3 ed., p. 412.

<sup>25</sup> BURDICK, PARTNERSHIP, 3 ed., 411.

<sup>26</sup> See an account in the REPORT ON PROFIT-SHARING AND LABOUR CO-PARTNERSHIP IN THE UNITED KINGDOM, [Cmd. 544] 1920, *supra*, pp. 109-113. The scheme has now been abandoned, and the factory transferred to other owners.

society, as a body corporate, became a limited partner with Messrs. Gilbert, as general partners, under the provisions of the Limited Partnership Act of 1907. After the payment of salaries to the general partners, and five per cent on their invested capital, the remainder of the profits were paid to the society for the account of its members. The capital thus received, after the payment of five per cent to the members on their respective shares, and of certain other expenses, was applied by the society to increase its capital as a limited partner in Gilbert Brothers, Ltd. An elected committee of the society was empowered to examine into the state and prospect of the partnership business, and to advise with the general partners thereon and (in so far as the same is permitted by the Limited Partnership Act, 1907) to meet and confer with the general partners, whenever occasion required, upon all differences and questions concerning the capital of the partnership, and the managers' salaries. Thus the employees indirectly acquired an interest in the business and divided its profits as in the Dennison plan, but necessarily their participation in the management was of a limited advisory character.

Another type of organization, which perhaps is susceptible of being molded to effectuate an "industrial copartnership," is the much discussed business trust. Some enthusiasts for this modern device (or rather, modern adaptation of an old device) profess to believe that the business trust at no remote date is destined to crowd out the corporation "as a business instrumentality for ordinary enterprises."<sup>27</sup> Constitutional advantages in the matter of doing business in foreign jurisdictions,<sup>28</sup> supposed advantages regarding taxation,<sup>29</sup> freedom from inquisitorial legislation applicable to corporations,<sup>30</sup> continuity of management,<sup>31</sup> and other consid-

<sup>27</sup> R. J. Powell, "The Passing of the Corporation in Business," 2 MINN. L. REV. 401.

<sup>28</sup> R. J. Powell, *supra*, 2 MINN. L. REV. 401, 412; GUY A. THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS, § 14; SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., §§ 176-178.

<sup>29</sup> *Cf.* under the federal revenue laws, *Crocker v. Malley*, 249 U. S. 223 (1919); *Chicago Title Co. v. Smietanka*, 275 Fed. 60 (1921); *Hecht v. Malley*, 276 Fed. 830 (1921); *Malley v. Bowditch*, 259 Fed. 809 (1919).

<sup>30</sup> This would be likely to prove a fleeting advantage if the use of business trusts ever became so common as to crowd out the corporation. See *Home Lumber Co. v. State Charter Board*, 107 Kan. 153, 190 Pac. 610 (1920), holding a business trust subject to corporate restrictions on selling stock and securities.

<sup>31</sup> SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., § 7.

erations, have all been urged in favor of the business trust.<sup>32</sup> On the other hand, it has been doubted whether the business trust is readily adaptable to conducting an active and expanding industrial enterprise.<sup>33</sup> Certainly, so far, the device has been used more for holding and investment companies,<sup>34</sup> and for the management of real estate,<sup>35</sup> than for the conduct of industrial ventures. Its use in this field is not uncommon, however, and some large manufacturing plants are conducted as business trusts.<sup>36</sup> It is frequently made use of in some parts of the country in the organization of oil companies.<sup>37</sup>

Assuming, then, that the promoters of an industrial enterprise, after weighing all the advantages and disadvantages, decide to organize as a business trust, may the main features of industrial copartnership be incorporated in the formal declaration of trust? It is not uncommon for a declaration of trust to provide for the issue of different classes of beneficial certificates, preferred and common, with varying powers in the holders thereof.<sup>38</sup> The declaration could therefore provide for first preferred certificates, second preferred certificates, managerial industrial partnership certificates, and employee industrial partnership certificates, with the respective powers and privileges accorded to the corresponding shares of stock in the Dennison Manufacturing Company. Care would be necessary in delimiting the powers of the voting certificate holders, the principal employees, to whom the managerial industrial partnership certificates would be issued, because the courts will look behind the form of the trust and see the substance of a partnership wherever the effective control and direction of the business is lodged in the association of beneficiaries. Thus, in one of the leading cases, where the beneficiaries of a business trust were empowered to meet at

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<sup>32</sup> See especially, the careful discussion by H. L. Wilgus, "Corporations and Express Trusts as Business Organizations," 13 MICH. L. REV. 71, 205.

<sup>33</sup> See "The Massachusetts Trust as a Substitute for Incorporation," 89 CENT. L. J. 275; THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS, § 16.

<sup>34</sup> *Kimball v. Whitney*, 233 Mass. 321, 123 N. E. 665 (1919); WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS, § 18.

<sup>35</sup> SEARS, TRUST ESTATES AS BUSINESS COMPANIES, § 179.

<sup>36</sup> See SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., v to vii; also § 184.

<sup>37</sup> *Davis v. Hudgins*, 224 S. W. 73 (Tex. Civ. App., 1920).

<sup>38</sup> *Rhode Island Hospital Trust Co. v. Copeland*, 39 R. I. 193, 98 Atl. 273 (1916); SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2 ed., § 197.

any time upon the written petition of holders of one-tenth of the certificates, and at such meetings to authorize or instruct the trustees in any matter, to remove any trustee and appoint another in his place, and to alter or amend the declaration of trust, such beneficiaries were held to be, in fact and in law, partners.<sup>39</sup>

This is a clear case on one side of the line. On the other side are clear cases like *Williams v. Milton*,<sup>40</sup> and *Crocker v. Malley*,<sup>41</sup> where the beneficiaries simply draw their dividends, are not associated together for collective action, and have no power in the selection or control of the trustees. Between these two extremes it cannot be said that the cases thus far have marked out a definite dividing line. Where under the declaration the trustees are given full powers of management, it has been urged that the mere latent power in the certificate holders to alter or amend the trust, and thus in the future to vest the conduct of affairs in themselves, should not constitute the beneficiaries partners.<sup>42</sup> The contrary view has been taken, however.<sup>43</sup> A power in the certificate holders by a vote to terminate the trust is not significant.<sup>44</sup> Certainly the bare power to fill vacancies among trustees caused by death or resignation is not sufficient to turn the beneficiaries into partners.<sup>45</sup> Further, it seems that the power in the certificate holders to elect trustees periodically for substantial terms should not make them partners, if the trustees, during their terms of office, have full discretion and control; and it has been so held.<sup>46</sup> This point, however, cannot be said to be finally

<sup>39</sup> *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808 (1911) (see the original papers); *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (1914). But cf. *Cox v. Hickman*, 18 C. B. 617, 624 (1856), 3 C. B. (N. S.) 523 (1857), 8 H. L. C. 268 (1860); *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., §§ 67, 79; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246 (1893).

<sup>40</sup> 215 Mass. 1, 102 N. E. 355 (1913).

<sup>41</sup> 249 U. S. 223 (1919).

<sup>42</sup> *WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS*, p. 58. See *Bingham v. Graham*, 220 S. W. 105 (Tex. Civ. App., 1920). Cf. a case under the Federal Bankruptcy Act. *In re Associated Trust*, 222 Fed. 1012 (1914).

<sup>43</sup> *Simson v. Klipstein*, 262 Fed. 823 (1920). Criticized in *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., § 94.

<sup>44</sup> *Davis v. Hudgins*, 225 S. W. 73 (Tex. Civ. App., 1920). But see *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., § 91.

<sup>45</sup> *Smith v. Anderson*, 15 Ch. D. 247, 284 (1880). Cf. *Mallory v. Russell*, 71 Iowa, 63, 32 N. W. 102 (1887).

<sup>46</sup> *Home Lumber Co. v. State Charter Board*, 107 Kan. 153, 190 Pac. 610 (1920); *WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS*, p. 57.

settled in Massachusetts.<sup>47</sup> In *Dana v. Treasurer*,<sup>48</sup> the certificate holders were held to constitute a partnership where the declaration of trust empowered them to elect four trustees at each annual meeting to serve three-year terms, and by a two-third vote to alter, amend, or terminate the trust at any regular or special meeting. It does not appear what would have been held if only the power to elect trustees for three-year terms had been given. In *Kimball v. Whitney*,<sup>49</sup> where the powers conferred were essentially the same as in the *Dana* case, the court expressly left the question open. Until the law of business trusts is more clearly defined it cannot be affirmed with confidence, therefore, that trust certificate holders with powers equal to those conferred on the holders of the managerial industrial partnership stock in the Dennison Manufacturing Company would not, in some jurisdictions, at least, be held to be partners.<sup>50</sup>

It is not to be supposed that any one plan of organization would

<sup>47</sup> In *Hoadley v. County Commissioners*, 105 Mass. 519 (1870), legal title to the property was held by a trustee, but the management of the business was vested in an executive committee of shareholders elected by the whole body of shareholders and apparently removable at any time. *Whitman v. Porter*, 107 Mass. 522 (1871), is meagerly reported and cannot be taken as decisive. In *Phillips v. Blatchford*, 137 Mass. 510 (1884), a trustee held legal title, but the business was conducted by a board of managers elected by the certificate holders from among their number; the certificate holders, in special meeting which might be called at any time, were empowered to give detailed instructions to such managers. See original papers in the case. In *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 5 N.E. 284 (1885), the shareholders could remove the board of managers at any time. In *Sleeper v. Park*, 232 Mass. 292, 122 N.E. 315 (1919), the original papers disclose that the trustees were removable at any time, and subject to the instructions of the shareholders, given by a two-third vote, "in all particulars."

<sup>48</sup> 227 Mass. 562, 565, 116 N.E. 941 (1917).

<sup>49</sup> 233 Mass. 321, 123 N.E. 665 (1919).

<sup>50</sup> Even though held to be partners, however, they would probably not run any risk of contractual liability, for the usual trust agreement requires the trustees expressly to stipulate in all contracts that the beneficiaries shall not be personally liable. It seems that such a stipulation is valid. *Bank of Topeka v. Eaton*, 100 Fed. 8 (1900), 107 Fed. 1003 (1901); *BURDICK, PARTNERSHIP*, 3 ed., pp. 40-41; *SEARS, TRUST ESTATES AS BUSINESS COMPANIES*, 2 ed., §§ 77-88; *Wrightington*, "Modern Business Organizations," 24 CASE & COMMENT, 184; *Wrightington*, "Voluntary Associations in Massachusetts," 21 YALE L. J. 311, 313-321.

Of course if partners, they could not escape direct tort liability, though they could be indemnified by insurance. In *Sleeper v. Park*, 232 Mass. 292, 122 N.E. 315 (1919), as the beneficiaries were held to be partners, it seems they would have been liable to the plaintiff for personal injuries, but suit was brought only against the trustees.

be fitted in all its details to every industrial undertaking. This much may be said, however, that the Dennison experiment demonstrates the great adaptability of the corporate form in the hands of resourceful men. No doubt other resourceful men, interested in the problem and not constitutionally averse to trying something which has not been done before, will adapt and improve upon the methods outlined, or perhaps devise some new method yet unthought of, for introducing into industry an adjustment to the immediate advantage of the workers, both with brain and hand, by whom the invested capital is utilized, and which, by reason of the hoped-for by-product of industrial peace and efficiency, may prove to be to the ultimate interest of the investors themselves.

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